FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 30 1959
JAMES R. BROWNING, Clerk

No. 445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

WALDO FRANK,

Petitioner,

v.

CHRISTIAN A. HERTER, Secretary of State.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
25 Broad Street,
New York 4, N. Y.,

DAVID REIN,
711 - 14th Street, N.W.,
Washington, D. C.,

Attorneys for Petitioner.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes, Proclamations, Executive Orders and Regulations Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	14
Appendices	15
A. Opinion in *Worthy* v. *Herter*	15
B. Opinion in *Frank* v. *Herter*	30
C. Judgment in *Frank* v. *Herter*	37
D. Statutes, Proclamations, Executive Orders and Regulations	38

CITATIONS

Cases

Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U. S. 103	7
Crandall v. Nevada, 73 U. S. 35	12
Greene v. McElroy, 360 U. S. 474	8, 9, 10
Grosjean v. American Press Co., 297 U. S. 233	6
Kent v. Dulles, 357 U. S. 116	2, 5, 6, 8, 10, 11, 12
Korematsu v. United States, 323 U. S. 214	5
Myers v. United States, 272 U. S. 52	7
Panama Refining Co. v. Ryan, 293 U. S. 388	11
Reid v. Covert, 354 U. S. 1	12
United States v. Curtiss-Wright Corp., 299 U. S. 304	7
Worthy v. Herter, U. S. App. D. C., No. 14,806	1, 5, 9

Constitution and Statutes

	PAGE
Constitution of the United States:	
Art. I, Sec. 1	11
First Amendment	2, 11, 12
Fifth Amendment	2, 11, 12
Federal Statutes:	
Act of May 22, 1918, c. 81, 40 Stat. 559	10
Act of July 3, 1926, c. 772, 44 Stat. 887, 22 U. S. C. 211(a)	2, 10
Immigration and Nationality Act, June 27, 1952, § 215, 66 Stat. 190, 8 U. S. C. 1185	3, 10
28 U. S. C. 1254(1)	2
3 Stat. 195 (1815)	7
11 Stat. 52 (1856)	10

Proclamations and Executive Orders

Presidential Proclamation No. 2914 (1950), 64 Stat. A454	3
Presidential Proclamation No. 3004 (1953), 67 Stat. C31	3, 9
Executive Order No. 7856 (1938), 3 F. R. 799, 22 CFR §§ 51.75-51.77	3, 9

Departmental Regulations

PAGE

Passport Regulations 22 CFR:

§ 51.175 ..... 3, 9

§§ 53.1-53.8 ..... 3, 9, 10

Congressional and Executive Materials

H. Rep. No. 485, 65 Cong., 2d Sess. 7

H. Rep. No. 2684, 85 Cong., 2d Sess. 11

The Right to Travel, S. Doc. No. 126, 85th Cong., 2d Sess. (1958) .....

56 Cong. Rec. 6192 10

Texts, Articles and Miscellaneous Materials

Jefferson, *Writings*, Ford's Ed., 1894, Vol. 3, pp. 155-156 7

37 Dept. of State Bull. 999 (1957) 4

New York Times, Nov. 21, 1957, p. 17, col. 1 4

Wright, *The Control of American Foreign Relations* (1922) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

WALDO FRANK,

Petitioner,

v.

CHRISTIAN A. HERTER, Secretary of State.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Waldo Frank respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on July 6, 1959, affirming a summary judgment against petitioner entered in the United States District Court for the District of Columbia in a suit brought to enjoin the Secretary of State from preventing petitioner's travel to China.

Opinion Below

The District Court wrote no opinion. The Court of Appeals affirmed *per curiam* on the authority of *Worthy* v. *Herter* (Appendix A, p. 15). The opinion has not as yet been reported, but is appended hereto as Appendix B, p. 30.

Jurisdiction

The judgment of the Court of Appeals was made and entered on July 6, 1959 (Appendix C, p. 37). Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the Secretary of State is authorized by law to prevent American citizens from travelling to China.

2. Whether the Secretary of State is authorized by law to establish categories of persons, some of whom may go to China and others not.

3. Whether the Secretary's action preventing petitioner from travelling, speaking and writing in China abridges freedom of speech, of assembly, or of the press, in violation of the First Amendment to the Constitution, or deprives petitioner of liberty without due process of law in violation of the Fifth Amendment.

4. Whether the Secretary's action in permitting some citizens to travel to certain countries while preventing petitioner from doing so is unreasonably discriminatory in violation of the Fifth Amendment.

Constitutional Provisions, Statutes, Proclamations, Executive Orders and Regulations Involved

The statutes and regulations involved in this case are those considered by the Court in *Kent* v. *Dulles*, 357 U. S. 116, and are set forth in Appendix D, *infra*, pp. 38-47. The following are the two statutes and their implementing regulations:

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. 211(a) (giving the Secretary of State exclusive authority to issue passports), *infra*, p. 38.

Executive Order No. 7856 of 1938, 3 F. R. 799, 22 CFR 51.75-51.77 (authorizing the Secretary to restrict a passport against "use" in certain countries, etc.), *infra*, p. 41.

2. The Immigration and Nationality Act of 1952, § 215(a), 66 Stat. 190, 8 U. S. C. 1185 (making it unlawful during war or emergency for a citizen "to depart from or enter" the United States without a passport), *infra*, p. 38.

Presidential Proclamation No. 2914, 64 Stat. A454 (declaring the existence of the Korean emergency), *infra*, p. 41.

Presidential Proclamation No. 3004, 67 Stat. C31 (making departure and entry of citizens subject to regulation by Secretary of State), *infra*, p. 43.

Regulations of the Department of State, 22 CFR 53.1-53.8 (requiring passports for departure and entry except for travel in the western hemisphere), *infra*, p. 45.

Statement of the Case

The petitioner, Waldo Frank, a scholar, author and journalist, was invited to China to lecture on Walt Whitman and other aspects of American literature at the University of Peking (R. 4, 11). Petitioner accepted this invitation so that he might deliver the lectures, write a book on his observations in China, and act as a correspondent in China for some twenty-two Spanish and Portuguese language newspapers in the United States and abroad which regularly print his column (R. 4, 14).

It is the general policy of the State Department "not to issue passports valid for travel to Communist China" (R. 27). Passports, when issued, are marked:

"This passport is not valid for travel to the following areas under the control of authorities with which the United States does not have diplomatic relations:

Albania, Bulgaria, and those portions of China, Korea and Viet-Nam under Communist control." (R. 3)

Petitioner holds a passport so marked (R. 3, 40). The Department has seized and has refused to renew the passports of American citizens who have travelled to China, and has publicly announced that travellers who disregard the restrictions may be criminally prosecuted (R. 4).

Petitioner repeatedly requested the State Department to issue to him a passport valid for travel to China. The Department, although recognizing petitioner's professional reputation and his intention to visit China as a journalist (R. 23, 30), repeatedly refused to afford petitioner a passport valid for such travel (R. 4, 40). The Department also informed petitioner "that Americans are not permitted to travel to Communist China" (R. 27).

The State Department has, however, made individual exceptions to this policy of prohibiting travel to China. For example, it has permitted an American lawyer to visit China when a federal criminal indictment might otherwise have been dismissed;* it has permitted relatives to visit Americans imprisoned by the Chinese government.** The Department has also announced a policy of permitting certain selected news-gathering organizations each to choose a correspondent to receive a passport valid for travel to China (R. 4, 115-116). Initially, the Department authorized such passports for twenty-four correspondents (R. 4). It later increased the number to thirty-one.

On November 12, 1958, petitioner instituted an action against the then Secretary of State seeking a judgment declaring that he had a right to travel to China and ordering that he be issued a passport valid for that purpose (R. 3). He alleged that the action of the Secretary in deny-

---

* *New York Times*, November 21, 1957, p. 17, col. 1.

** 37 Dept. of State Bull. 999 (1957).

ing him a passport valid for travel to China was without legal authority and in violation of his constitutional rights, and was discriminatory against him because of the issuance of such passports to other newspaper correspondents (R. 5-6).

The Department responded that the action taken was within the discretionary power of the Secretary and accordingly not subject to court review (R. 38-41). Upon the basis of the pleadings and accompanying affidavits, the District Court granted summary judgment for the government, denied petitioner's motions for summary judgment and preliminary injunction, and dismissed the complaint (R. 133).

The Court of Appeals affirmed *per curiam* (Appendix B, *infra*, p. 30) on the authority of the intervening decision in *Worthy* v. *Herter* (R. 135). Judge Burger wrote a concurring opinion in which he dealt additionally with the question of discrimination against petitioner as a newspaper correspondent, an issue which he considered beyond the scope of the court's decision in *Worthy* v. *Herter* (R. 135), Appendix A, *infra*, page 15.

Reasons for Granting the Writ

1. The decision of the court below, while based upon a different factual situation, is in our view in conflict with the principles stated and the findings made by this Court in *Kent* v. *Dulles*, 357 U. S. 116. In *Kent*, this Court held that the right to travel was protected by the Constitution, and that it was subject to restriction only where, upon a showing of the gravest imminent danger to the public safety (citing *Korematsu* v. *United States*, 323 U. S. 214, 218), "'the Congress and the Chief Executive moved in coordinated action'", 357 U. S. 116, 128. The Court said: "No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of this citizen has been made here."

Ibid. There has been no showing in the present case of "gravest imminent danger" any more than in *Kent*. The requisite joint action by the executive and legislative branches is equally lacking here.

2. The court below, in upholding the power asserted by the Secretary, has decided an important question of federal law which has not been, but should be, settled by this Court. The present case involves a claim of Executive power to prohibit American citizens from visiting particular areas of the world for any purpose whatsoever, and to decide which American journalists shall be entitled to report the news from such areas and which not. These powers, not expressly sanctioned by any statute, presidential order or decision of this Court, have never before, we believe, been asserted in peacetime by a Secretary of State.

This case involves as great an assertion of governmental power and as serious a restraint of "an important aspect of the citizen's liberty" as was involved in *Kent* v. *Dulles*, 357 U. S. 116, 127. Indeed, the number of persons directly affected is many times greater than those involved in *Kent*, which concerned personal disqualifications.

Here there is not only a denial of an individual's freedom to go where he wishes; there is a tampering with one of the fundamental mechanisms of democracy—the public's ability to examine the premises of government policy. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243. Prohibition of travel to China stifles information about a country which plays a significant role in world affairs. It impairs the public's ability to assess and influence one of the crucial aspects of American policy.

3. The court below found that the Secretary had an inherent power over foreign travel, a theory disavowed by the Solicitor General before this Court only last year. The lower court stated that "the refusal of the Executive to accord Government approval for a citizen to travel" in a designated area was within "the power of the Executive in foreign affairs" (Appendix A, pp. 23, 24).

This statement is based upon the erroneous assumption that if private conduct affects foreign affairs, the Executive may act concerning it without legislative authority. While the President is "the sole organ of the federal government in the field of international relations" (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320), he is not the maker of the laws on this subject any more than in the domestic field. That case and the other one frequently cited, *Chicago & Southern Air Lines Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, involved legislative delegations of power to the Executive. Absent such delegation, the President may not control, for example, imports or exports of products to or from particular countries although the subject may be classified as foreign affairs (see Wright, *The Control of American Foreign Relations* (1922), pp. 301-303).

Even less may he prohibit the travel of citizens where personal liberties of movement and speech are involved. Thomas Jefferson stated that the Executive power does not include "the prerogative powers • • • of retaining within the State, or recalling to it any citizen thereof • • • except as he may be authorized from time to time by the legislature to exercise any of those powers." • Hence, the agreed necessity for legislation prohibiting travel into enemy territory [3 Stat. 195 (1815)] and the advice to Congress in 1918 that

> "the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers." (H. Rep. No. 485, 65th Cong., 2d Sess., p. 2)

In its brief in the *Kent* case (p. 43, note 37) the Government stated that the substantive power existing in the

---

• Jefferson, Draft of a Fundamental Constitution for the Commonwealth of Virginia, proposed in 1783 (Writings, Ford's ed. 1894, Vol. 3, 155-156), quoted by Mr. Justice McReynolds, dissenting, in *Meyers* v. *United States*, 272 U. S. 52, 235.

Secretary which, it was urged, had been confirmed by statute did not include substantive power to restrain the departure or entry of non-passport bearing citizens, absent further legislation, but only the power to exercise discretion in issuing passports to citizens.

The Government's brief pointed out that there may be a right to exclude aliens which is inherent in the Executive power to control the foreign affairs of the nation, but stated categorically (p. 93) that:

> "* * * we make no claim of such inherent Executive power to restrict the travel of citizens. * * *"

The opinion below cannot be reconciled with these considered concessions on the part of the Solicitor General, nor with the history to which we have referred.

4. The Court of Appeals reached the constitutional questions because it found executive and congressional action authorizing the instant restraint on travel. But here, as in *Kent*, neither the President nor Congress has "made such provision in explicit terms", 357 U. S. 116, 130. Hence, in deference to this court's settled policy of avoiding unnecessary constitutional decisions, the determination of the Court below should have been based upon a lack of executive and congressional action.

(a) The alleged existence of Executive power over foreign travel is irrelevant since the President has not exercised any such power over travel to particular areas. The court below was in error in assuming that the President had authorized the Secretary to impose these or any geographic restrictions. As this Court recently said in *Greene* v. *McElroy*, 360 U. S. 474, 496:

> "* * * the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather it is whether the President or Congress exercised such a power. * * *"

Here, as in that case, "explicit action by lawmakers" is required before we can permit administrators to make "decisions of great constitutional import" (*Id.* at 507).

The Court below, in holding that "the President's delegation to the Secretary is complete", relied upon Executive Order No. 7856 of 1938 and upon Proclamation No. 3004 of 1953 (*Worthy* v. *Herter*, Appendix A, *infra*, p. 26). Neither supports that conclusion.

Executive Order 7856, 3 F. R. 799 (1938), 22 CFR 51.75, authorized the Secretary of State "in his discretion * * * to restrict a passport * * * against use in certain countries." But at the time of its promulgation a passport was not a legal necessity for any travel. Thus this presidential Order of 1938 was a device to discourage travel, not a step in its prohibition.

Proclamation No. 3004, 67 Stat. C31 (1953), similarly did not authorize the Secretary of State to make it unlawful for American citizens to enter particular foreign countries. Its title, "Control of Persons Leaving or Entering the United States", as well as its contents, establish it as an exercise of border control. It makes the "departure and entry" of citizens "from and into the United States" subject to the regulations of the Secretary in 22 CFR 53.1-53.8.

There is, therefore, no Presidential action which grants authority to the Secretary to control entry into countries other than the United States.

(b) The alternative theory relied upon by the court below was that the Secretary had been empowered by Congress to impose these controls. Such statutory authority, we submit, does not exist. The required "explicit action" (*Greene* v. *McElroy*, 360 U. S. 474, 507) cannot be found.

(i) The Act of July 3, 1926 provides that "The Secretary of State may grant and issue passports * * *

under such rules as the President shall designate • • •." This is a codification of a century old statute [11 Stat. 52 (1856)] intended to prevent various state and municipal officials from issuing passports. *Kent* v. *Dulles*, 357 U. S. 116, 123-125, 128-130. This 1926 Act contains no explicit authority to forbid travel to areas designated by the Secretary. As held by this Court in the *Kent* case, implicit authority under this very statute could, at the most, be found only where there had been an established administrative practice prior to 1926. There was no such departmental practice of prohibiting travel to specific countries. Such "explicit action" of Congress, we submit, is a prerequisite to administrative action which here, as in *Greene* v. *McElroy*, 360 U. S. 474, so impinges upon basic liberties as to raise substantial constitutional problems.

(ii) Nor does the Immigration and Nationality Act of 1952, § 215, contain any restriction upon the places to which one may travel. It merely makes it illegal for citizens to "depart from or enter the United States" during war or national emergency without a passport.

The legislative history of the statute and of its 1918 predecessor [40 Stat. 559 (1918)] establishes its purpose as American border control. Its "chief object" was to obstruct "aliens and alien enemies and renegade citizens" who "can now enter and depart without any power • • • to intercept or delay them" (56 Cong. Rec. 6192). See also the Government's brief in the *Kent* case (pp. 43-57). The Secretary's regulations construe this statute, as do we, as being limited to control over entry into and departure from the United States (22 CFR 53.1-53.8).

In 1958 the President asked Congress for "clear statutory authority to prevent Americans from using passports to travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign-policy objectives. * * *" (H. Rep. No. 2684, 85th Cong., 2d Sess., p. 3). Congress has thus far failed to comply with that request.

5. If the statutes discussed above were construed so as to grant the Secretary the authority claimed, there would, we believe, be an unconstitutional delegation of legislative power. To construe these statutes so broadly as to authorize the imposition of geographical restrictions upon travel would appear to make them invalid for want of "standards * * * adequate to pass scrutiny by the accepted tests." *Kent* v. *Dulles*, 357 U. S. 116, 129, citing *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420-430.

The statutes relied upon are totally devoid of standards. They do not express any Congressional will as to what restrictions may be imposed, where, for what reasons, and upon whom. In *Kent*, this Court's narrow construction of the statutes made it unnecessary to determine their constitutional adequacy from that viewpoint. But the broad construction adopted by the court below would present squarely the constitutional question under Article I, § 1, as to whether the Secretary is not exercising "the lawmaking functions of the Congress." *Kent, supra*, at 129.

6. The absence of explicit statutory and executive authorization should make it no more necessary here than in *Kent* to resolve the major constitutional questions of congressional and presidential power. However, a finding of such authority would require the resolution by this Court of several issues under the First and Fifth Amendments:

(a) In addition to being a "liberty" protected by the Fifth Amendment (*Kent* v. *Dulles*, 357 U. S. 116, 125), freedom to travel is essential to the freedom of assembly (see *Crandall* v. *Nevada*, 73 U. S. 35) and to the freedoms of speech and the press (*Kent* v. *Dulles*, *supra*, at 126-127), protected by the First Amendment. This Court's reference in *Kent*, *ibid.*; to Professor Chafee's reminder that "Foreign correspondents and lecturers on public affairs need first-hand information" is directly apposite to the present situation.

This case presents the important question as to whether the interest of society in the liberty admittedly involved here is outweighed constitutionally by the Secretary's claim, upheld below, that restraint on such liberty will aid our foreign policy. The propriety of that policy is not in issue here; the Court need not pass on that. But it is the function of the Court to determine to what extent, if at all, the Executive may limit, as an instrument of that foreign policy, the citizen's right to travel, lecture and report.

The Government has the burden of justifying any restraint whether imposed here or abroad. This Court, we believe, has "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." *Reid* v. *Covert*, 354 U. S. 1, 5-6. Finally, in the present case, the Government must justify not only the loss of the individual's rights, but also the effect on his fellow citizens who are hampered in exercising their rights of speech, press, petition and franchise if their knowledge is limited to Government-approved sources. A most serious issue of freedom of the press is raised where the Government, as here, directly determines which newspapers may report vital information to the American people.

(b) Independent of the other constitutional issues involved, the Secretary has discriminated against petitioner in apparent violation of the Fifth Amendment. The Sec-

retary has permitted certain newsgathering organizations, selected by himself, to choose correspondents to whom the Government will then issue passports valid for travel to China (R. 116). The newspapers for which petitioner is a regular correspondent are not in this select group. The Secretary's action is a reversion, *pro tanto*, to the licensing systems of the Tudors and the Stuarts which were repudiated by those who adopted our Constitution.

There is no statute, executive order or even departmental regulation which authorizes such arbitrary choice by the Secretary or sets up standards which will determine his choice. This power is applied on a purely *ad hoc* basis (see *e.g., supra*, p. 4), whenever the Secretary determines that travel to China does or does not promote the foreign policy aims of the government. In practice this means that his decision is based not only on amorphous "foreign policy considerations" but upon considerations of political expediency.

Thus, the Secretary has given preference to established news agencies with permanent staffs abroad. This results in only the most affluent and influential press organizations (perhaps those least likely to criticize our foreign policy) securing passports for their correspondents. Further, the decision as to which individuals may go to China has been delegated to these private agencies. This has resulted in the anomaly of the issuance of an unrestricted passport to former Governor Averell Harriman, who for this purpose became a "full-time correspondent," while professional writers such as petitioner and Mr. Worthy are prevented by their government from reporting on China.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
25 Broad Street,
New York 4, N. Y.,

DAVID REIN,
711 - 14th Street, N.W.,
Washington, D. C.,

Attorneys for Petitioner.

September, 1959.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14806

WILLIAM WORTHY, JR.,

Appellant,

v.

CHRISTIAN A. HERTER, Secretary of State,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 9, 1959

MR. WILLIAM M. KUNSTLER, with whom MR. WALTER E. DILLON, JR., was on the brief, for appellant.

MR. F. KIRK MADDRIX, Attorney, Department of Justice, with whom MR. SAMUEL L. STROTHER, Attorney, Department of Justice, was on the brief, for appellee.

Before MR. JUSTICE BURTON, retired,* PRETTYMAN, Chief Judge, and WILBUR K. MILLER, Circuit Judge.

PRETTYMAN, *Chief Judge*: Our appellant, William Worthy, Jr., was a newspaperman duly accredited by the *Afro-American* Newspapers, the *New York Post*, and the Columbia Broadcasting System. In 1957 he applied for renewal of a passport originally issued to him in 1955.

* Sitting by designation pursuant to Sec. 294(a), Title 28, U. S. Code.

The passport contained a restriction stating it was not valid for travel to five named areas under control of authorities with which the United States does not have diplomatic relations, including the portions of China, Korea and Viet Nam under Communist control; and also a restriction against travel in Hungary. After various proceedings Worthy was asked whether he would make a commitment to abide the restrictions. He declined to do so, and the renewal was refused. The background for the refusal was that when the passport was originally issued it contained the same restrictions but Worthy nevertheless traveled extensively in both Communist China and Hungary. The refusal of the passport rested in no part upon Worthy's personal beliefs, writings or character. It was an application of the Secretary of State's general policy of refusing Government sanction to travel by United States citizens in certain areas of the world, presently under Communist control and deemed by him to be trouble spots.

We note immediately that the point here presented in no wise resembles the matter decided by the Supreme Court in *Kent* v. *Dulles*.[1] There the Court held that the Secretary refused passports because of the beliefs and associations of the applicants and that he had no statutory authority to refuse on such grounds. In the case at bar no beliefs, associations, or personal characteristics are involved. Nor is this a case in which the Secretary has proposed a restriction upon a passport for reasons of internal security, i.e., protection against internal subversion. The factors here are political and military conditions in certain areas of the earth.

Worthy makes four points. 1. He says the right to travel is a constitutional right and may be abridged only when there are overriding considerations of the public safety. 2. The Secretary lacks statutory authority to

[1] 357 U. S. 116 (1958).

deny a passport to prevent travel in these countries. 3. Alternatively, to the extent the refusal rests upon Executive power over foreign relations, it is still subject to applicable constitutional provisions, and the reasons given by the Secretary do not warrant this abridgment. 4. The refusal is an abridgment of the freedom of the press.

Worthy says, correctly, that the denial of a passport, under the statutes of today, must be justified as a denial of a right to travel; and he says, also correctly, that the right to travel is protected by the Constitution, being a part of the right to liberty. But the simple, succinct phrases of the Bill of Rights, indestructible protections to some of the fundamentals of our way of life, can be, and often are, expanded by rhetorical inflation beyond all semblance to the realities with which they were meant to deal. The right to travel is a part of the right to liberty, and a newspaperman's right to travel is a part of the freedom of the press. But these valid generalizations do not support unrestrained conclusions. For the maintenance and preservation of liberty, individual rights must be restricted for various reasons from time to time. In case of a clear and present danger to the national security, even so generally unrestrictable a right as speech can be restricted. In case of a reasonably anticipated threat to security or to law and order, many acts by individuals can be restricted. An assembling mob bent on disorder can be dispersed. A man with a contagious disease can be locked in his house. Potentially dangerous actions must be restricted in order to prevent harm to others. So we have sanitation, fire, building and speeding regula ions.

Liberty itself is inherently a restricted thing. Liberty is a product of order. There is no liberty in anarchy or in chaos. Liberty is achieved by rules, which correlate every man's actions to every other man's rights and thus, by mutual restrictions one upon the other, achieve a result

of relative freedom. The mere day-to-day maintenance of the order which insures liberty requires restrictions upon individual rights. Some actions, neither harmful nor potentially dangerous, must be restricted simply for the sake of good order in the community. So we have parking, traffic and zoning regulations and rules of court.

No indivdual may take whatever he pleases, and so all others are free to enjoy their possessions. One man may not assault another with whom he disagrees, and this restriction protects the freedom of all to speak and live peacefully. One may not spread vicious lies about another, and so all are free to enjoy their good reputations. Every person is forbidden to join with his competitors to drive another person out of business, and so all are free to pursue their trades and buy products at reasonable prices. Everybody's liberty is restricted by prohibitions against driving recklessly, spreading disease, and leaving hidden dangers on property, and so the whole community is free to enjoy health. One cannot trample his neighbor's flower beds, or even trespass on his lawn. Even in a neighborhood community every man's right to roam is drastically restricted. A man who asserts his own uninhibited freedom to go where he pleases is a menace and is quickly put in his place. He may not park where he pleases, or drink where he pleases, or spit where he pleases. In the community the police take care of these matters, and in so doing the officers act as servants of the rest of the community; they are the government.

Freedom to worship as each one chooses is restricted in some ways. Worship by human sacrifice is forbidden. A member of one religion cannot interrupt the services of another religion in order to worship in his own way. Through this restriction all have freedom to worship as they choose.

Freedom of the press bears restrictions. It does not include the right to publish what another has registered

with the copyright office. Merely because a newsman has a right to travel does not mean he can go anywhere he wishes. He cannot attend conferences of the Supreme Court, or meetings of the President's Cabinet, or executive sessions of Committees of the Congress. He cannot come into my house without my permission, or enter a ball park without a ticket of admission from the management, or cross a public street downtown between crosswalks. He cannot pass a police cordon thrown about an accident, unless he has a pass from the police. A newsman's freedom to travel about is a restricted thing, subject to myriad limitations.

The peace-loving have rights. Those who recognize the fundamental necessities of liberty as a delicate product of order have power to protect themselves and their liberty. The liberty of everyone, law-abiding citizen and criminal alike, is involved in the maintenance of order and is threatened when disorder brings either the necessity or the opportunity for force to replace correlated rules of conduct. Such a threat may easily arise from conditions in foreign lands. The people have a right to protect their liberty, no matter whence the threat.

Indeed it is quite clear that those who cry the loudest for unrestricted individual freedom of action would be the loudest in bemoaning their fate if their plea were granted. The same release from constituted authority would set free persons so powerful, so ruthless, so bent on autocratic control that no newsman would have any liberty whatever. The customary prompt transformation of unrestrained liberty into dictatorship is one of the poignant lessons of history. These pleas for unrestricted individual freedom seem to us to be made upon a firm assumption that not too many people will be granted such liberty and not too much liberty in any event. Worthy himself says he does not plead for an unrestricted liberty for all people. His plea is for his own liberty to do what he happens to choose.

So we conclude on the point that the right to travel, like every other form of liberty, is, in our concept of an ordered society, subject to restrictions under some circumstances and for some reasons.

The next questions are what restrictions are here sought to be imposed by the Secretary and why he seeks to impose them.

Worthy seeks an unrestricted passport, so that he may travel anywhere in the world. He wishes especially to enter certain countries, now under Communist control, which, like most others, require him to possess a valid United States passport. He advised the Board of Passport Appeals he had written Premier Chou En-lai that he sought "full information about any and all news stories, especially stories that involve the risk of war, as is the case with current Chinese-American issues over Taiwan, Quemoy and Matsu." The Secretary will not issue him a passport unless Worthy says he will not enter these designated countries. Thus Worthy is now free to travel in public places in the United States, Canada and Mexico, and if he agrees to the restrictions he will be free to travel in places open to foreigners in all countries which will grant him visas, except those named by the Secretary. The quantum by which Worthy's freedom has been reduced is the area of places open to foreigners in those of the six named countries which might grant him visas. No restrictions are proposed upon Worthy's thinking or writing. The restrictions proposed are on his physical presence in specified zones in foreign countries. They are restrictions upon acts, *i.e.*, travel.

The Secretary has given two separate but related reasons for this reduction of Worthy's freedom: (1) The areas named are potential or actual "trouble spots", where the presence of American citizens may place them in danger and further irritate our relations with the named countries and their allies. (2) The presence of

American citizens in these areas and the official approval of their presence there will impede the execution of American foreign policy in relation both to these countries and to other countries.

The facts which caused the Secretary to designate these places and to refuse official sanction of travel therein are shown us by the Secretary. Indeed they are established by many current events; they appear almost daily upon the front pages of the newspapers; they have been declared repeatedly by the President, his predecessors, and the Congress. We need not catalog them. The Korean difficulty with Communist China is still in the armistice stage, not finally settled. All trade with that part of China is prohibited. The situation in respect to Formosa and the small offshore islands, where we have a treaty of mutual defense, fluctuates in tensity. We oppose Communist China's membership in the United Nations. American citizens are held in hostage in that country. The reasons underlying the restriction on travel in Hungary are less numerous but amply sufficient. Unless almost the whole of our foreign policy and the titanic domestic burdens being presently borne by our people are devoid of factual foundation, there is presently in the world a deadlock of antagonistic forces, susceptible of erupting into a fatal cataclysm. The capacity of incidents arising from the conduct of individuals to ignite that conflagration is well proven. Worthy says the reasons averred by or available to the Secretary are insufficient to support the restriction of his passport. We hold they are ample.

Designations of restricted areas are made from time to time by the Secretary and thereafter are frequently withdrawn by him. Such has been a customary practice. For example, travel to Hungary was restricted on December 21, 1949, and the restriction was lifted upon the release of Robert Vogeler. The same thing happened in Czechoslovakia in 1951 in connection with the Oatis incident.

Appendix A

We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of "foreign affairs". Such a determination involves information gleaned through diplomatic sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem that such a restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy. It depends upon this Government's attitude toward a foreign power and on that power's attitude toward us. Its locale is foreign territory. The assistance the Congress requires [2] the President to afford an American citizen in trouble abroad is a phase of "foreign affairs". The instrumentalities he must use to fulfill the congressional mandate are diplomatic, or foreign-service consular. A decision on the part of the President to prevent, if possible, the necessity for calling into play his diplomatic instrumentalities and the use of his powers—persuasive or compulsory—upon a foreign nation is a phase of "foreign affairs". The selection by him

[2] 22 U. S. C. A. § 1732: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

of the means to be used in a given such case rests in large part upon policy, obviously foreign policy.

If then, the designation of a foreign area as a potential trouble spot is a "foreign affair" and the extrication of a citizen from trouble in a foreign country is a "foreign affair", is the refusal of the Executive to accord Government approval for a citizen to travel in such a designated area also a "foreign affair"? We think it is. The essence of the conduct of foreign affairs is the maintenance of peace, the prevention of war. The Constitution places that task of prevention in the hands of the Executive. The two correlative powers, to conduct war and to prevent war, are Executive functions under our Constitution.

Of course the prevention of clashes with foreign governments embraces diplomatic negotiations with those governments. But, as a matter of hard, practical reality, it also involves restrictions upon acts of our own citizens which may reasonably be foreseen as breeding clashes. History establishes that either the behavior or the predicament of an individual citizen in a foreign country can bring into clash, peaceful or violent, the powers of his own government and those of the foreign power. This is a fact, not a theory. The nub of the problem at bar revolves about a fact, not a supposititious theorem. The acts of individuals do cause clashes; the prevention of such acts does prevent clashes. Such clashes, whether diplomatic or military, involve "foreign affairs". The plight of airmen who have crossed borders, and the tense crises thereby created, are recent common knowledge. Surely the Executive can forbid such crossings by our airmen, commercial or private as well as military.

We think that, if the Executive foresees that the presence of American citizens in a designated foreign area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction

the travel of American citizens in that area. To hold the contrary would be to hold that the protection of the peace against American-caused incidents in foreign countries is outside the realm of foreign affairs. Such latter holding would be both illogical and unrealistic. In foreign affairs, especially in the intimate posture of today's world of jets, radio, and atomic power, an individual's uninhibited yen to go and to inquire may be circumscribed. A blustering inquisitor avowing his own freedom to go and do as he pleases can throw the whole international neighborhood into turmoil. Worthy's avowed intent is to seek "especially stories that involve the risk of war".

The general principles governing the power of the Executive in foreign affairs are discussed by the Supreme Court in *Perez* v. *Brownell;*[3] *Chicago & Southern Air Lines* v. *Waterman Corp;*[4] and *American Communications Ass'n* v. *Douds,*[5] especially in Mr. Justice Jackson's concurring opinion.[6] We dealt with them at length in *Briehl* v. *Dulles.*[7] We think we need not here venture upon another extensive examination of that phase of our problem. It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs.[8]

Worthy says that a denial of the right to travel to certain places cannot be based on consideration of for-

---

[3] 356 U. S. 44 (1958).

[4] 333 U. S. 103 (1948).

[5] 339 U. S. 382 (1950).

[6] *Id.* at 422.

[7] 101 U. S. App. D. C. 239, 248 F. 2d 561 (1957).

[8] Chicago & Southern Air Lines v. Waterman Corp., 333 U. S. at 109-111.

eign policy, because foreign policy is vague and fluctuating. This contention ignores the President's undisputed power to abridge various other rights on foreign policy grounds. The President may recognize foreign governments, make executive agreements,[9] and grant, deny or modify licenses for international air transportation. When the President exercises his authority in any of these fields, his decision may seriously affect the freedom of an American, "outside areas of plainly harmful conduct, * * * to shape his own life as he thinks best, do what he pleases, go where he pleases."[10]

The nature of the power of the President in the conduct of foreign affairs is well illustrated by the *Waterman* case, *supra*. The President's order to modify a license for overseas air transportation was in accordance with Section 601, Title 49, United States Code. That section provides that such licenses "shall be subject to the approval of the President." Congress laid down no standards or guide for him to follow. The President's justification for the change was that he had reached his decision "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility. * * *."[11] The Supreme Court held that the President's decision was guided by his foreign policy and was immune from judicial review. The dissenting Justices agreed with this proposition but thought that procedure before the Civil Aeronautics Board should be reviewable.

Worthy argues that the Secretary does not have statutory power to designate restricted geographical areas.

---

[9] United States v. Pink, 315 U. S. 203 (1942); United States v. Belmont, 301 U. S. 324 (1937).

[10] CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956), p. 197, quoted in Kent v. Dulles, 357 U. S. at 126.

[11] 333 U. S. at 111.

We think, as we have indicated, that the President has ample power under the Constitution itself. His delegation to the Secretary is complete.[12] But, if the power to act rests upon statutes, we think the existing ones are clearly sufficient. Section 1185(b), Title 8, United States Code,[13] provides that, while a proclamation of national emergency is in force,[14] "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The President delegated this authority to the Secretary by Proclamation No. 3004.[15] On this point we appeared, in *Briehl* v. *Dulles*, *supra*, to be in agreement. In his dissenting opinion Judge Bazelon said, referring to Proclamation No. 3004: "Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports."[16] The 1926 Act contained the unequivocal provision: "The Secretary of State may grant and issue passports * * *."[17] The Supreme Court said in *Kent* v. *Dulles*:[18]

> "Under the 1926 Act and its predecessors a large body of precedents grew up which repeat over and

---

[12] Proc. No. 3004, 67 Stat. C31 (1953); Exec. Order No. 7856, 3 Fed. Reg. 681 (1938).

[13] 66 Stat. 190 (1952).

[14] See Proc. No. 3004, *supra* note 12.

[15] *Ibid.*

[16] 101 U. S. App. D. C. at 259, 248 F. 2d at 581.

[17] 44 Stat. 887, 22 U. S. C. A. § 211a.

[18] 357 U. S. at 124-125.

> again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said."

If the Secretary has any discretion it seems to us it must include a discretion to prevent trouble when he reasonably foresees trouble. Without a preventive discretion, he has no discretion of any realistic content. Reasonable basis for the Secretary's anticipation of possible involvement appears in ample measure in this case. So we think the statutes, if they have any meaning at all, include power to do what the Secretary did in the case before us.

The *in terrorem* argument that to sustain the Secretary's power in this case is to confer upon him an unrestricted discretion to grant or to refuse passports is wholly unimpressive. He has not exercised such a discretion. He does not claim it, and we are not considering any such power in the remotest degree. The claimed power, so far as this case is concerned, is narrow and clearly delineated.

It is said that many of the incidents involved in the reported court cases dealing with foreign affairs were in time of war. But foreign affairs involve more than wars, and the President's powers over foreign affairs are not only war powers. As a matter of fact these are two separate powers in the Constitution. And, as a further matter of fact, governments have many more dealings with each other and problems concerning each other in peacetime than they do in wartime. Not only so, but, as we have already emphasized, the duty of the President to prevent war is as important as is his power to conduct one.

Worthy errs when he assumes that the Secretary has forbidden him to travel at all or that the action "is tantamount to imprisoning him." Worthy, so far as this record shows, can have a passport to travel all over the world

except in certain designated areas. He is in no sense imprisoned, except in the same rhetorical sense, although in less degree, that man is imprisoned because he is earthbound.

Worthy says situations which demand curtailment of constitutional rights must be of an exceptional and severe emergency nature—"clear and present danger", "gravest imminent danger", etc. Several comments may be made. In the first place the nature of the right and the nature of the restriction are important. As we have already pointed out, the right here involved is not a right to think or speak; it is a right to be physically present in a certain place. The basis of the restriction is not personal but is the military and political situation in the designated areas. In the second place there is a grave, clear and present danger, as we have indicated. When a gunman points a loaded gun, one need not await the report from a shot to know that danger is clear and present. The contention that there is no grave danger involved in the wanderings of uninhibited American newsmen in China or in Hungary today reflects an unawareness of realities. In the third place the Constitution puts in the President the authority to evaluate the military and political exigencies in foreign countries. The courts are the least able of all organs of government to make such evaluations, and they are wholly without authority to make them.

Worthy says the presence of Americans, at least of American newsmen, in the restricted areas would better our foreign relations rather than worsen them. This is an argument he should make to the President or the Congress. The authority to determine what would and what would not better our foreign relations is not vested in individual citizens, even though they be newsmen, any more than authority to declare a damaged wall in a newsman's home town dangerous or not dangerous is vested in him. The Fire Chief determines that condition and enforces his conclusion.

Appendix A

To order the Secretary of State to do something, because we believe it would be better for our foreign relations than his plan, would be a gross usurpation of Executive powers. Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even "public opinion". He makes his decision with the aid of the Department of State, a large organization with stations throughout the world, as well as on the basis of information received from all other parts of the Executive branch. We, if we had all this information, might reach a different decision. But the Constitution has wisely placed that burden in the hands of one who must justify his decisions before the electorate.

The judgment of the District Court is

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15059

WALDO FRANK,

Appellant,

v.

CHRISTIAN A. HERTER, Secretary of State,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided July 6, 1959

MR. LEONARD B. BOUDIN, with whom MR. DAVID REIN was on the brief, for appellant.

MR. F. KIRK MADDRIX, Attorney, Department of Justice, with whom MESSRS. SAMUEL L. STROTHER and ANTHONY F. CAFFERKY, Attorneys, Department of Justice, were on the brief, for appellee.

Before: BAZELON, FAHY and BURGER, *Circuit Judges.*

PER CURIAM: The questions involved in this case were necessarily decided by this court in *Worthy* v. *Herter*, —— U. S. App. D. C. ——, —— F. 2d —— (June 9, 1959). On the authority of that decision the judgment of the District Court granting the motion of the Secretary for summary judgment, denying appellant's motion for summary judgment, and dismissing the complaint, is

Affirmed.

Appendix B

BURGER, *Circuit Judge, concurring*: I do not think this court in *Worthy* v. *Herter*, No. 14806, —— U. S. App. D. C. ——, —— F. 2d —— (June 9, 1959), reached or was confronted with an important issue here presented by appellant. That issue was whether, conceding the Secretary's power to limit travel to Communist China, the formula and criteria prescribed for the selection of a limited number of news correspondents were unconstitutionally discriminatory as to this appellant.

Appellant is the holder of a duly issued passport from the Secretary of State which contains a provision:

> "This passport is not valid for travel to the following areas under the control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria and those portions of China, Korea and Viet-Nam under Communist control."

On application of appellant the Secretary of State declined to remove the restriction against travel to Communist China.

In support of his complaint seeking removal of the travel restraint clause as to Communist China and to enjoin the enforcement of sanctions against him, appellant makes various contentions: (1) that the Secretary of State has no statutory authority to prevent United States citizens from traveling to the China mainland by so restricting travel and by threatening to invoke civil and criminal sanctions for violation of restrictions; (2) that these travel restrictions are a violation of appellant's First Amendment rights of free speech and press and a deprivation of his right to earn a living by activities requiring travel; additionally that he has been denied due process under the Fifth Amendment; (3) that the Secretary's action in granting travel rights to 25 or 30 representatives of various news services while denying

the same rights to appellant individually is an unreasonable discrimination in violation of due process under the Fifth Amendment.

Appellant's pleadings describe him as a writer, scholar and teacher who has lectured here and abroad and who writes for 20 Latin American papers. Appellant asserts he has an invitation to lecture at the University of Peking, capital of Communist China, for "early 1959" and that early resolution of his rights is important to him.

The Secretary of State responds, as he did in *Worthy* v. *Herter, supra*: (1) that an essential feature of United States policy toward world Communism generally and Communist China in particular is to withhold recognition, *de facto* and *de jure*, of that regime; (2) that in the implementation of that policy travel of United States citizens to the China mainland, among other places under Communist control, has been prohibited; (3) that the Executive's power to conduct foreign affairs springs from the inherent powers of a sovereign, confirmed by the Constitution and that this power has been implemented by joint action of the President and Congress in statutes; (4) that in implementation of its policy, the Secretary has recently developed a formula to permit a limited number of news gathering agencies to designate representatives to receive passports to Communist China, the agencies being selected on the basis of established past interest in foreign news coverage.

The first two contentions of appellant are disposed of by our decision in *Worthy* v. *Herter*, and since that is dispositive no extended discussion of those issues is needed. The reasoning in the *Worthy* case seems to me unassailable and I would reach the same conclusion on the first two points raised in this case for essentially the same reasons as set out so clearly in that case by Chief Judge Prettyman.

The challenge to the Secretary's action as being discriminatory is, however, not necessarily controlled by the *Worthy* case and I now deal with that issue separately, as I think must be done.

It is axiomatic that the conduct of foreign affairs necessarily involves flexible measures and policies which can be adjusted to meet changing conditions. Just as Communist China altered its former rigid policy of admitting no American newsmen, this country must be free to alter its policies in that connection if those in charge of these purely political decisions think it is in the interest of the United States to do so. There is always risk that the Communist regime may try to make hostages of these Americans, as the Communists have so often done in Hungary, Yugoslavia and are now doing in Communist China. This is a calculated risk and to the extent permitted it should be allowed only in the discretion of those in possession of information such as the Secretary has. No American is *sent* there and those who seek to go take whatever risks are involved.

In the implementation of our foreign policy and especially in relation to Communist China, the State Department recently concluded that a limited number, approximately 40, news representatives would be permitted to go to the Chinese mainland, on an experimental and temporary basis, provided the forces in control of that area would receive them. This threshhold decision is political in the highest sense and is not reviewable on any basis in any circumstance by any court. Obviously, judges have neither the information essential to evaluate such a decision nor the competence and experience to appraise the information even if by chance it should be made available to them. Courts have no more occasion or power to inquire into such decisions than the State Department would have to inquire into the time allowed

for oral argument or the length of printed briefs on appeals in this court.

The second phase of the Secretary's decision, that dealing with the manner of selection of the correspondents to be afforded travel privileges to China's mainland, however is not similarly immune to judicial review. It is reviewable for, among other things, arbitrariness which would render the basis of the choice discriminatory. If, for example, the choice was limited only to Democrats or only to Republicans, obviously that would be improper and would fall. But judicial review even of the formula of selection is narrow and it is limited to determining whether the basis of the choice bears some rational relationship to the ends to be served. The distinction made between news agencies with a demonstrated interest in foreign news coverage and individual reporters must have some relevance to the purpose to be achieved. *Cf. Currin* v. *Wallace*, 306 U. S. 1 (1939); *Railway Express Agency* v. *New York*, 336 U. S. 106, 110 (1949); *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S. 266, 274 (1936) (Cardozo dissenting; *Stanley* v. *Public Util. Comm'n*, 295 U. S. 76 (1935); *Murphy* v. *California*, 225 U. S. 623 (1912); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911); *Watson* v. *Maryland*, 218 U. S. 173 (1910).

The Secretary invited each news gathering agency with a demonstrated interest in reporting foreign news to apply for leave to go to the China mainland. Specifically he set as an eligibility criterion the maintenance of at least one full-time correspondent overseas. The invitation went, on this basis, to 40 or more news agencies. We are told 30 such agencies made application and that only one correspondent designated by a news agency has been granted leave to enter mainland China by the forces in control of that area.

Appendix B

Of course, the fact that the Communists might possibly try to exercise a careful choice of United States newsmen thought by them to be friendly to Communism, or "neutralist" in their sympathies would not necessarily justify our Government in using an individual's established and demonstrated hostility to Communism as the sole criterion for its selection of the 40 American newsmen. But even the probability that the Communists will try to secure some advantage out of admitting American news reporters to the mainland emphasizes the strictly political nature of the entire problem.

Our Government has decided to try out this program of allowing some news correspondents to go to Communist China on an "experimental and temporary basis" because presumably, as a calculated risk, in the conduct of foreign affairs it may help our ultimate objectives of world peace and stability, reduction of tensions, and resistance to Communism. In such an experiment the political branches of the government must be allowed wide latitude in carrying out its policy.

It can be assumed that appellant possesses the qualifications to observe, interpret and report events on China's mainland. But obviously the Secretary could not permit every United States citizen so qualified to travel to Communist China in light of complex political factors so well described by Judge Prettyman in *Worthy* v. *Herter*. Nor can it be said that every newspaper in the United States could send one reporter. Simply as a matter of numbers, a line must be drawn somewhere. The foreign policy considerations give the Secretary wide latitude in drawing a line and defining criteria.

It has been pointed out that having failed to achieve traditional diplomatic recognition from the United States, Communist China has for years carried on a program and policy of "people's diplomacy" with private, unofficial

contacts and exchanges designed to achieve on an unofficial basis that which, as a matter of deliberate national policy we have denied it. At stake are vast interests not the least of which is a possible seat in the Security Council of the United Nations. Here again, the correctness of our policy of thus frustrating Communist objectives is not open to judicial scrutiny any more than would be the defense plans of the Joint Chiefs of Staff or the decision to abandon or not abandon aircraft carriers in favor of some other weapon.

Our duty is not to decide whether the Secretary of State has developed the best formula and criteria for this "experimental and temporary program" of allowing a limited number of news correspondents to go to a previously proscribed area, or whether 40 is the correct number, but simply whether he has exceeded his authority in acting as he has thus far, as shown by this record.

I agree, first, with the holding that the Secretary has not exceeded his powers as defined in *Worthy* v. *Herter*, and second, I would hold explicitly (as my colleagues do by implication) that the formula and criteria established for the selection of the "limited number" of representatives of news gathering agencies are not discriminatory in the sense urged by appellant.[1]

---

[1] The Secretary's brief tells us that if one of the news gathering agencies which meets the standards prescribed should designate appellant as its correspondent, he may go to the mainland of China if he can get in.

Appendix C

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

No. 15,059

Civil 2849-58

WALDO FRANK,

Appellant,

—v.—

CHRISTIAN A. HERTER, Secretary of State,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before:

BAZELON, FAHY and BURGER, *Circuit Judges.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: July 6, 1959.

Separate concurring opinion by Circuit Judge Burger.

Appendix D

Statutes, Proclamations, Executive Orders and Regulations

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. § 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. Section 215 of the Immigration & Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

> TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmisisble under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense

committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chaper may be considered as permits to enter for the purposes of this section.

3. The pertinent portions of Executive Order No. 7856 of 1938, March 31, 1938, 3 F. R. 799 as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting or withdrawing passports additional to the rules in this part and not inconsistent with.

4. The pertinent portions of Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, are as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world

and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency . . .

. . . .

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a. m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

. . .

Appendix D

5. The pertinent portions of Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C 31, "Control of Persons Leaving or Entering the United States By the President of the United States," are as follows:

> WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190),[7] authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and
>
> WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and
>
> WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941,[8] imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and
>
> WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:
>
> NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of

the Immigration and Nationality Act and by section 301 of title 3 of the United States Code,* do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the

Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

• • •

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provison of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

• • •

6. The pertinent portions of the Regulations issued by the Secretary of State, as found in Part 53 of Title 22 of the Code of Federal Regulations, are as follows:

§ 53.1 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person

entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§53.2 and 53.3. No fee shall be collected by a diplomatic or consular officer of the United States for or in connection with such verification.

§53.2 *Exceptions to regulations in §53.1.* No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, Puerto Rico, and the Virgin Islands, or between any such places; or

(b) When traveling between the United States and any country or territory in North, Central, or South America or in any island adjacent thereto: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North, Central, or South America or in any island adjacent thereto, for which a valid passport is required under §§53.1 to 53.9: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided,* That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

* * * *

§53.5 *Prevention of departure from or entry into the United States.* * * * *

Appendix D

§53.6 *Attempt of a citizen or national to enter without a valid passport.* * * *

* * * *

§53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

FILE COPY

FILED
NOV 6 1959
JAMES R. BROWNING, Clerk

No. 445

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALDO FRANK, *Petitioner*

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

J. WALTER YEAGLEY,
Assistant Attorney General,

JOHN F. DAVIS,
Assistant to the Solicitor General,

KEVIN T. MARONEY,
BRUNO A. RISTAU,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulation involved	2
Statement	4
Argument	7
Conclusion	14
Appendix	15

CITATIONS

Cases:

Chicago & S. Air Lines v. *Waterman Corp.*, 333 U.S. 103 ... 8
Kent v. *Dulles*, 357 U.S. 116 ... 7, 9
Nereide, The, 9 Cranch 388 ... 8
Peru, Ex parte, 318 U.S. 578 ... 8
United States v. *Belmont*, 301 U.S. 324 ... 8
United States v. *Curtiss-Wright Corp.*, 299 U.S. 304 ... 8
United States v. *Pink*, 315 U.S. 203 ... 8
Worthy v. *Herter*, No. 14806, C.A.D.C., decided June 9, 1959 ... 7

Statutes and Regulations:

Immigration and Nationality Act of 1952, Section 215 (8 U.S.C. 1185) ... 3, 9, 10
22 U.S.C. 211(a) ... 2
22 U.S.C. 1732 ... 2, 9, 10
22 C.F.R., §§ 53.1 to 53.7 ... 10
Executive Order No. 7856, 3 F.R. 799, as codified in title 22 C.F.R. § 51.75 ... 4, 10

Miscellaneous:

Bishop, *International Law* (1953), p. 559 ... 9
Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 445-446, 472-455 ... 9
2 Hyde, *International Law* (1922), pp. 169-172 ... 9
2 Lauterpacht-Oppenheim, *International Law* (7th ed. 1952), pp. 134-144 ... 9
New York Times, September 22, 1959, p. 16 ... 8
New York Times, November 2, 1959, pp. 1, 17 ... 9
Pub. No. 3004, 67 Stat. C31 (1953) ... 10

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 445

WALDO FRANK, *Petitioner*

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. B, pp. 30-36) is reported at 269 F. 2d 245.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1959 (Pet. App. C, p. 37). The petition for a writ of certiorari was filed on September 30, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Government, in the conduct of foreign policy, may restrict the travel of its citizens in the portion of China under Communist control by limiting passports to exclude that area.

2. Whether the petitioner was illegally discriminated against by reason of the refusal of the Government to lift the travel ban as to him when it permitted a limited number of correspondents designated by certain news-gathering organizations as their representatives to go to Communist China.

STATUTES AND REGULATIONS INVOLVED

1. 22 U.S.C. 211(a) provides:

Authority to grant, issue, and verify passports.

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. 22 U.S.C. 1732 provides:

Release of citizens imprisoned by foreign governments.

Whenever it is made known to the President that any citizen of the United States has been un-

justly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress. (R.S. § 2001.) [Derived from the Act of July 27, 1868, c. 249, § 3, 15 Stat. 223, 224.]

3. 8 U.S.C. 1185 provides:

Travel control of citizens and aliens during war or national emergency.

(a) *Restrictions and prohibitions on aliens.*

When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * * * *

(b) *Citizens.*

After such proclamation as is provided for in subsection (a) of this section has been made and

published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

* * * * *

4. The pertinent portion of Executive Order No. 7856 (March 31, 1938), 3 F.R. 799, 805, as codified in Title reads as follows:

22 C.F.R.

PART 51—PASSPORTS

Subpart A—Regulations of the President

* * * * *

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

STATEMENT

The petitioner, a United States citizen, is currently in possession of a United States passport, No. 850376, due to expire on February 15, 1960. At all times relevant to this case, the passport contained the following restrictive endorsement (R. 3):

> This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria and those portions

of China, Korea and Viet-Nam under Communist Control.

This same limitation appeared in all other passports issued on or about the date of the petitioner's (R. 96).

The petitioner requested the Secretary of State to remove this restrictive endorsement from his passport and to permit him to travel to Communist China for the announced purpose of assisting in the furthering of cultural relations between the United States and the Chinese people (R. 20-22). The State Department refused his request (R. 22-24).

In August 1957, the Secretary of State decided to permit travel of a limited number of United States news representatives to Communist China on an experimental basis, to provide for direct reporting to the American people about internal conditions on the China mainland. To implement this experimental program, the Department of State requested each news-gathering organization (approximately 40) which had demonstrated sufficient interest in foreign news coverage to maintain at least one full-time American correspondent overseas, to designate one correspondent for the China mainland for a period of six months or longer. To this request by the Department, twenty-four news-gathering organizations[1] responded initially (R. 117), and each selected one correspondent to represent it in Communist China. The State Department thereupon validated the passports of these newsmen for travel to those portions of China under Communist control (R. 115-117). With one exception (*infra*, p. 12), the Communist Chinese regime has continu-

[1] At the present this number has been increased to thirty-one. Appendix, *infra*, p. 15.

ously refused to allow any of these news correspondents to enter the Chinese mainland.

After the above policy excepting certain international newsmen from the travel ban to Communist China had been in existence for a period of one year, the petitioner requested the Department of State to remove the limitation in his passport, on the basis that his "profession as journalist and scholar certainly qualifie[d] him for inclusion in the group of journalists whose travel was authorized by the Department" (R. 35-36). The Department replied that the petitioner—who had not been named to represent one of the 24 news-gathering organizations—"was not eligible for inclusion in the group of 'reporters—foreign correspondents' who have been issued passports valid for travel to and in Communist China" (R. 36-38).

The petitioner thereupon filed a complaint on November 12, 1958 (R. 3-6), in the United States District Court for the District of Columbia seeking a declaration that he had a constitutional right to travel to Communist China, that travel to Communist China would not constitute a violation of the passport laws of the United States and the terms and conditions of his passport, and that the refusal of passport facilities to the petitioner was arbitrary and discriminatory; and seeking an order directing the Secretary of State to refrain from continuing to deny the petitioner passport facilities necessary for his travel to Communist China (R. 6).

The District Court rendered a summary judgment against the petitioner on March 23, 1959, dismissing his suit (R. 133).

On July 6, 1959, the Court of Appeals affirmed the lower court's disposition of the case (Pet. App. B, pp.

30-36) on the authority of that court's earlier decision in *Worthy* v. *Herter*, No. 444 (Pet. App. A, pp. 15-29).

ARGUMENT

1. This case involves, not a mere question of the administration of the passport regulations, but an issue of foreign policy as it is implemented by the issuance of passports. It is obvious that the Secretary of State should not grant passports purporting to authorize travel in areas where United States citizens are, pursuant to validly adopted foreign policy, refused official permission to travel. If the foreign policy of the United States with respect to permitting intercourse with Communist countries were subject to review by the courts, the refusal to issue a passport or the imposition of limitations on one which is issued would provide an appropriate means of raising the issue. But if that foreign policy is not subject to judicial review, then it should not be indirectly reviewed under the guise of protecting a citizen's right to travel or his right to a passport. In this respect, this case differs basically from *Kent* v. *Dulles*, 357 U.S. 116, where the issue was whether the petitioner there, and others similarly situated, could be denied passports because of their particular "beliefs or associations" not on the ground of a foreign policy applicable to Americans generally. *Id.*, at 130.

2. If the Executive branch of the government has authority, as part of its duty to fix and implement foreign policy, to refuse official permission to United States citizens to travel in specific areas of foreign countries, the exercise of that authority is not subject to judicial review. This Court has repeatedly held

that such determinations of foreign policy are exclusively for the Executive and Legislative branches of the government and will not be reviewed by the courts. *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103; *United States* v. *Pink*, 315 U.S. 203; *Ex parte Peru*, 318 U.S. 578; *United States* v. *Belmont*, 301 U.S. 324; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304.

3. The court below was, we believe, entirely correct in its determination that it was well within the realm of the Executive's authority with respect to foreign relations to fix the limits where American citizens should travel in foreign countries. As we have pointed out, restriction on travel in Communist China was applied generally to all citizens and the limitation was included in all passports (*supra*, p. 5; R. 96). Moreover the measure was adopted—in part at least, and cumulative to other sanctions—in order to attempt to obtain the release of five United States citizens unjustly imprisoned in Communist China.[2] In *The Nereide*, 9 Cranch 388, Chief Justice Marshall stated at 422:

> * * * [T]he court is decidedly of opinion, that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation

[2] See the statement of Walter S. Robertson, United States delegate to United Nations anent the admission of Communist China to the United Nations. New York Times, September 22, 1959, p. 16, especially column 3.

> to avenge its wrongs, in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights, and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation, and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics.

Moreover, Congress has by statute required the President to take appropriate action to protect Americans unjustly deprived of their liberty abroad. 22 U.S.C. 1732, *supra*, pp. 2-3. This has a double effect in respect to the passport limitations here involved: First, it provides general authority to the Executive to exercise that sanction, among others, as a step to free the citizens already imprisoned. And it would also support the executive action in excluding citizens from an area where they might in turn be imprisoned and thus require remedial action. International law publicists recognize that the suspension of travel in a foreign country is an instrument of foreign policy. Bishop, *International Law* (1953), p. 559; see also 2 Hyde, *International Law* (1922), pp. 169-172; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 445-446, 453-455; 2 Lauterpacht-Oppenheim, *International Law* (7th ed. 1952), pp. 134-144.[3]

This argument disposes of the petitioner's point that under *Kent*, there must be "explicit action" by Congress authorizing the particular limitations imposed by the Secretary of State (Pet. 9-10). The authority here

[3] Pursuant to 8 U.S.C. 1185, the Secretary of State recently restricted the rights of aliens and citizens to leave the United States by private plane for Cuba. See New York Times, November 2, 1959, pp. 1, 17.

comes primarily not by action of Congress, but from the Constitution itself, which places the power over foreign relations in the Executive branch. As the cases cited, *supra*, p. 8, indicate, this grant has been given the broadest scope and there is no need for the type of specific delegation which may be required for an area within the legislative authority of Congress. As for the authorization from the President, in whom the Constitution vests the power, to the Secretary of State, it was specifically granted by Executive Order No. 7856, 3 F.R. 799, now appearing as 22 C.F.R. § 51.75, *supra*, p. 4.

There is also legislation in which Congress has recognized that the Executive must have power over foreign travel in order to perform its functions and has given its sanction to travel limitations. Section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185, *supra*, pp. 3-4, grants to the President specific authority to impose certain travel restrictions on both citizens and non-citizens in time of war or national emergency. This power is exercised at present under Proc. No. 3004, 67 Stat. C31 (1953) and 22 C.F.R. §§ 53.1 to 53.7. And, as we have noted, the authority granted the President to "use such means, not amounting to acts of war" to secure the release of citizens unjustly imprisoned abroad, 22 U.S.C. 1732, *supra*, pp. 2-3, was intended to authorize a traditional international sanction, recognized as such by international law authorities—restricting intercourse with the foreign country involved.

4. The petitioner, finally, insists (Pet. 12-13) that the State Department's policy of validating the passports of a limited number of news representatives to

go to the Chinese mainland on an experimental and temporary basis, provided the Red Chinese regime receives them, is arbitrary. The identical argument was advanced below, and rejected. It is based on the assumption that the method of selection was not proper.

As is pointed out in the Statement (*supra*, pp. 5-6), the Department of State, in 1957, attempted to devise a formula to permit a *limited* number of American news-representatives to travel to the mainland of China in order to allow direct reporting by them for the American press about conditions in the area under Communist control. One of the main difficulties which at once arose was to strike a proper balance between the interest of the United States in keeping the number of newsmen within reasonable limits—so as not to create a false impression that the general prohibition against indiscriminate travel to the China mainland was being abrogated—and at the same time to afford to the news-gathering organizations as wide a latitude as possible. To foreclose possible future claims of "discrimination," "arbitrariness," or "favoritism," the Department, after consultation with representatives of the press, set forth the following as the basis for selection: each news-gathering organization which had demonstrated sufficient interest in foreign news coverage to maintain at least one full-time American correspondent overseas was asked to notify the Department whether it wished to send a full-time American correspondent to the China mainland, to be stationed there on a resident basis for six months or longer. The State Department agreed to validate, for a limited period, the passport of one news-correspondent associated with such an organization who was to be selected by the news organization itself. The newsmen who

qualify under this program are selected by the qualifying news-gathering agency, and not by the State Department, subject only to the limitation that the designation be made in good faith.

When the plan was first announced, twenty-four affirmative replies were at once received from such organizations as fell within the criteria set forth above; since August 1957, this number has increased to thirty-one (see the Appendix, *infra*, p. 15). The qualifying criteria were reasonable in terms of the objective sought—to permit direct reporting by American newsmen to the American people about conditions in the area under Chinese Communist control without substantially relaxing to the general ban on travel by Americans into Communist China. The plan, as devised, is experimental and limited. Only one of the correspondents thus selected and given a validated passport has been up to this time permitted by the Chinese Communists to enter the mainland.[4]

Turning to the petitioner, it is clear on the record in his case that he does not meet the criteria set forth by the State Department. No news-gathering organization, as outlined above, has ever submitted his name as its selected correspondent for purposes of gathering news in Communist China. Indeed, the petitioner does not, and cannot, make that claim. His grievance, as he puts it, is merely that other journalists have been given validated passports for travel to the China mainland, and he has not (Pet. 13).

---

[4] John Strohm, a representative of Newspaper Enterprise Ass'n, Inc., of New York City, was granted entry by the Communist Chinese and visited the mainland from September 8 to September 30, 1958.

In his concurring opinion, Judge Burger examined the conflicting interests, the criteria selected by the Secretary of State, and the petitioner's claim, and said:

> * * * [The] threshhold decision [to permit a limited number of news correspondents to go to Communist China on an experimental basis] is political in the highest sense and is not reviewable on any basis in any circumstance by any court [Pet. App. B, p. 33].
>
> * * * * *
>
> Our duty is not to decide whether the Secretary of State has developed the best formula and criteria for this "experimental and temporary program" * * *, but simply whether he has exceeded his authority in acting as he has thus far, as shown by this record [Pet. App. B, p. 36].

On balance, Judge Burger concluded that the formula and criteria established for the selection of the reporters were not "discriminatory in the sense urged by appellant" (Pet. App. B, p. 36). That conclusion is correct and does not call for further review here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

KEVIN T. MARONEY,
BRUNO A. RISTAU,
Attorneys.

NOVEMBER, 1959.

APPENDIX

According to information received from the Department of State, the following news-organizations have been accredited to send reporters to Communist China as of October 1959:

Organization	Designee
American Broadcasting Company	Falk, Raymond F.
Associated Press	Edwards, Forrest
Baltimore Sun	Potter, Philip
Chicago Daily News	Beech, William Keyes
Chicago Tribune	Manly, Chesly
Christian Science Monitor	No designee
Columbia Broadcasting System	Searles, Guy W.
Copley News Service	Brines, Russell
Cowles Magazines	No designee
Denver Post	Hosokawa, William K.
Encyclopedia Britannica	Benton, William
Fairchild Publications	Gilkerson, Yancey Sherard
McGraw Hill	Sanders, Sol W.
Minneapolis Star & Tribune	Grim, George Howard
Mutual Broadcasting System	Lewis, Fulton, Jr.
National Broadcasting Company	Robinson, James G.
National Geographic Magazine	No designee
Newspaper Enterprise Association	No designee
New York Herald Tribune	Steele, Archibald T.
New York Times	Durdin, Frank Tillman
Newsweek	Elegant, Robert S.
North American Newspaper Alliance	Forman, Harrison
Reader's Digest	Michener, James
St. Louis Post Dispatch	Childs, Marquis William
Saturday Evening Post	Bess, Demaree
Scripps Howard	Russell, Oland Dale
Time, Incorporated	Burke, James Cobb
United Press International	Shapiro, Henry
U. S. News and World Report	Martin, Robert W.
Wall Street Journal	Oganesoff, Igor
Westinghouse Broadcasting Company	Sheean, James Vincent

☆U. S. GOVERNMENT PRINTING OFFICE 1959—529688/P O 608